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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 912

STANLEY STOUT AND FRANCES STOUT, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York (R. 12a)[1] is not reported. The *per curiam* opinion of the Court of Appeals (Pet. 11-12), affirming the District Court's dismissal of the action for lack of jurisdiction, is reported at 229 F. 2d 918.

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[1] Record references are to the pages of petitioners' appendix in the court of appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1956 (Pet. 13). The petition for a writ of certiorari was filed on April 30, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in this suit against the United States challenging the constitutionality of the wheat marketing quota provisions of the Agricultural Adjustment Act, both courts below properly rejected the contention that the Declaratory Judgment Act constituted an implied waiver of governmental immunity from suit.

STATUTES INVOLVED

The Declaratory Judgment Act and the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938 are set forth in the Appendix, *infra*, pp. 8-10.

STATEMENT

Petitioners, owners of a farm in New York, instituted this action against the United States in order to have declared invalid the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938, *infra*, pp. 8-10. When a wheat acreage allotment for a farm is established pursuant to that Act, wheat produced on excess acreage may be sold or used, with qualifications

immaterial here, only upon payment of a penalty on the excess wheat (R. 11a).[2]

Petitioners, after receiving notice that the United States intended to collect from them "a penalty for the growing and harvesting of wheat on [petitioners'] farm in excess of fifteen acres in the year 1954" (R. 3a), filed the instant action against the United States in the United States District Court for the Western District of New York. The complaint sought (1) a declaratory judgment that the "wheat regulation program" is unconstitutional and (2) an injunction to prevent the United States from collecting any penalty or "enforcing said program" (R. 5a). The United States moved to dismiss on the ground, *inter alia*, that the court lacked jurisdiction since the United States had not consented to such a suit (R. 9-11a). The court sustained the motion and dismissed the action (R. 12a).

The Court of Appeals affirmed *per curiam*, stating that "neither by the Declaratory Judgment Act nor otherwise has the United States consented to be sued in this type of action." While stating that it did not reach the merits of the constitu-

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[2] The detailed operation of the wheat marketing quota provisions, and the economic problems of the wheat industry which led to the enactment of those provisions are traced in *Wickard* v. *Filburn*, 317 U.S. 111, and in *Shafer* v. *United States*, 229 F. 2d 124 (C.A. 4), certiorari denied, May 14, 1956, No. 797, Oct. T. 1955.

tional question, the court further noted that *Blattner* v. *United States,* 223 F. 2d 468 (C.A. 3), "which seems directly in point, is authority for dismissal on the merits under the rule stated in *Wickard* v. *Filburn,* 317 U.S. 111."

ARGUMENT

Petitioners' main argument is that the Declaratory Judgment Act confers jurisdiction on the federal courts to entertain this type of suit, which is otherwise plainly unconsented, against the United States. Petitioners also urge that the referendum the Secretary of Agriculture is required by statute to conduct before putting into effect a wheat marketing quota discriminates against the small farmer and is therefore unconstitutional. Neither contention has merit. And there is no conflict of decisions. We submit that further review by this Court is unnecessary.

1. Petitioners do not challenge directly the long "accepted jurisprudential principle that no action lies against the United States" in the absence of an express and unequivocal consent provided for by act of Congress. *Dalehite* v. *United States,* 346 U.S. 15, 30, 31; *Feres* v. *United States,* 340 U.S. 135, 139; *United States* v. *Sherwood,* 312 U.S. 584, 587, 590; *United States* v. *Shaw,* 309 U.S. 495, 500-501; *Munro* v. *United States,* 303 U.S. 36, 41; *Lynch* v. *United States,* 292 U.S. 571. In endeavoring to escape the impact of this settled

principle, petitioners urge that the Declaratory Judgment Act confers the necessary jurisdiction on the District Court to entertain this action against the United States. But there can no longer be room for doubt that that Act was not intended to expand the jurisdiction of the District Courts over claims against the United States. *Di Benedetto* v. *Morgenthau,* 148 F. 2d 223, 225 (C.A. D.C.), certiorari dismissed, 326 U.S. 686; *Love* v. *United States,* 108 F. 2d 43, 50 (C.A. 8), certiorari denied, 309 U.S. 673; *Brownell* v. *Ketcham Wire & Mfg. Co.,* 211 F. 2d 121 (C.A. 9). Cf. *Blackmar* v. *Guerre,* 342 U.S. 512, 515-516. This Court has made it clear that while the Act "enlarged the range of remedies available [to litigants] in the federal courts * * * it did not extend their jurisdiction." *Skelly Oil Co.* v. *Phillips Co.,* 339 U.S. 667, 671; *United States* v. *West Virginia,* 295 U.S. 463, 475; Borchard, *Declaratory Judgments* (2d ed. 1941), p. 373:[3]

National Bank v. *Republic of China,* 348 U.S. 356, relied on by petitioners, is not in point. That case held that when a foreign sovereign sues in our courts it cannot avoid a counterclaim by pleading sovereign immunity. The decision in no way deals with the Declaratory Judgment Act or its effect on unconsented suits. Indeed, the only per-

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[3] Borchard points out that the question as to whether the Declaratory Judgment Act by itself extends jurisdiction to hear suits against the Government must be answered "clearly in the negative." *Declaratory Judgments* (2d ed. 1941), p. 373.

tinent case cited by petitioners fully recognizes that "It cannot be said that the Declaratory Judgment Act itself waives the immunity of the United States" and that the Act cannot be resorted to in order to "by-pass the sovereign's immunity from suit." *Pennsylvania R. Co.* v. *United States,* 111 F. Supp. 80, 85-86 (D.N.J.).

2. While, as the court below held, this lack of jurisdiction is dispositive of petitioners' claim, it is appropriate to note that the general constitutional objections asserted in the complaint (R. 4a-5a) against the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938 were fully considered and rejected by this Court in *Wickard* v. *Filburn,* 317 U.S. 111. *Accord*: *Beckman* v. *Mall,* 317 U.S. 597; *Bender* v. *Wickard,* 319 U.S. 731; *Blattner* v. *United States,* 223 F. 2d 468 (C.A. 3); *Shafer* v. *United States,* 229 F. 2d 124, 129 (C.A. 4), certiorari denied, May 14, 1956, No. 797, Oct. T. 1955.

Equally lacking in merit is petitioners' objection to the voting procedure. The Agricultural Adjustment Act of 1938 provides that the Secretary of Agriculture must conduct a "referendum, by secret ballot, of farmers who will be subject to the [wheat marketing] quota" before putting the quota into effect. 7 U.S.C. 1336, *infra,* p. 9. Petitioners argue that since only those farmers who harvest over fifteen acres of wheat are allowed to vote in the referendum, the smaller farmer, who harvests fifteen acres or less, is discriminated

against. The short and conclusive answer is that under the terms of the statute the farm marketing quota on wheat does not apply to any farm on which the acreage planted to wheat is "not in excess of fifteen acres" (7 U.S.C. 1340(7), *infra*, p. 10). Consequently, the small farmer, planting fifteen acres or less, is in no way affected by any marketing quota and should have no voice in determining whether the quota should go into effect. Certainly, there can be no valid objection to permitting only those farmers who will be subject to the quota to vote in the referendum. See *Currin* v. *Wallace*, 306 U.S. 1, 15; 18 F.R. 4221.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

MAY 1956.

APPENDIX

A. The Declaratory Judgment Act, as it appears in 28 U.S.C. 2201, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

B. The wheat marketing quota provisions of the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended (7 U.S.C. 1281, *et seq.*) provide in part:

> § 1335. Marketing quotas—Establishment
>
> (a) Whenever in any calendar year the Secretary determines—
>
> (1) that the total supply of wheat for the marketing year beginning in such calendar year will exceed the normal supply for such marketing year by more than 20 per centum; or
>
> (2) that the total supply of wheat for the marketing year ending in such calendar year is not less than the normal supply for the marketing year so ending, and that the average farm price for wheat for three successive months of the marketing year so ending does

not exceed 66 per centum of parity
the Secretary shall, not later than May 15 of such calendar year, proclaim such fact and, during the marketing year beginning July 1 of the next succeeding calendar year and continuing throughout such marketing year, a national marketing quota shall be in effect with respect to the marketing of wheat. * * *

§ 1336. Referendum

Between the date of the issuance of any proclamation of any national marketing quota for wheat and July 25, the Secretary shall conduct a referendum, by secret ballot, of farmers who will be subject to the quota specified therein to determine whether such farmers favor or oppose such quota. If more than one-third of the farmers voting in the referendum oppose such quota, the Secretary shall, prior to the effective date of such quota, by proclamation suspend the operation of the national marketing quotas with respect to wheat.

§ 1340. Supplemental provisions relating to wheat marketing quotas; * * *

* * * * *

(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

* * * * *

(4) Until the producers on any farm store, deliver to the Secretary, or pay the penalty on, the farm marketing excess of any crop of wheat, the entire crop of wheat produced on the farm shall be subject to a lien in favor of the United States for the amount of the penalty.

* * * * *

(7) A farm marketing quota on wheat shall not be applicable to any farm on which the acreage planted to the commodity is not in excess of fifteen acres. * * *

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